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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER KARDOS, NEIL R				
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/643,353

Applicant(s)

STAMM ET AL.

Examiner

Neil R. Kardos

Art Unit

3623

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 22 January 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-12 and 14-25 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-12 and 14-25 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/S508)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

This is a **FINAL** Office Action on the merits in response to communications filed on January 22, 2009. Claims 1, 24, and 25 have been amended. Currently, claims 1-12 and 14-25 are pending and have been examined.

Response to Arguments

Applicant's arguments filed on January 22, 2009 have been fully considered but they are not persuasive. Applicant argues the following:

- (A) Claims 1 and 24 recite patentable subject matter. (See Response, pages 10-11).
- (B) Richman and Whitacre disclose a traditional performance scorecard preparation method that is merely aided by a computer system, and not automatically performed by the computer system interacting with a plurality of databases as recited in claim 1. (See Response, pages 12-14).

Applicant's arguments will now be addressed in turn:

(A) Claims 1 and 24 recite patentable subject matter.

Regarding argument (A), Examiner respectfully disagrees. The claims have been amended to recite "using a plurality of databases and a computer that includes a scorecard engine" in the preamble, as well as "automatically" performing various steps "by the scorecard engine." The amendments fail to meet the requirements of the machine-or-transformation test. *See in re Bilski*, 545 F.3d 943, 956 (Fed. Cir. 2008); *Diamond v. Diehr*, 450 U.S. 175, 184

(1981); *Parker v. Flook*, 437 U.S. 584, 588 n.9 (1978); *Gottschalk v. Benson*, 409 U.S. 63, 70 (1972).

Regarding the first limitation, a preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976); *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951). Furthermore, a preamble generally is not limiting when the claim body describes a structurally complete invention such that deletion of the preamble phrase does not affect the structure or steps of the claimed invention. See MPEP 2111.02. Here, the claim body reciting the "scorecard engine" is capable of standing alone and does not require the computer recited in the preamble for completeness. Thus, the recitation of a "computer that includes a scorecard engine" in the preamble does not sufficiently tie the claim to a particular machine as required for patentability under § 101.

Regarding the second limitation, "a scorecard engine" could be software per se. Software per se is not a machine. See MPEP 2106.01 ("Both types of 'descriptive material' are nonstatutory when claimed as descriptive material *per se*"). Thus, the recitation of "a scorecard engine" in the body of the claim does not sufficiently tie the claim to a particular machine as required for patentability under § 101.

Regarding Applicant's argument that the claims "transform survey responses into a performance survey subject scorecard representing the actual survey subject's physical performance," the mere transformation of data is not sufficient to make an otherwise ineligible

process claim statutory under § 101. The machine-or-transformation test requires the transformation of an "article" into a different state or thing. *In re Bilski*, 545 F.3d 943, 962 (Fed. Cir. 2008). Here, a survey subject's physical performance is not an "article" within the purview of the transformation prong of the machine-or-transformation test. Thus, the claim fails this prong of the test and is not patentable under § 101.

(B) Richman and Whitacre disclose a traditional performance scorecard preparation method that is merely aided by a computer system, and not automatically performed by the computer system interacting with a plurality of databases as recited in claim 1.

Regarding argument (B), Examiner notes that Applicant is arguing the newly amended limitations of the claims. Examiner maintains that it is old and well-known in the art to automate processes for the sake of accompanying efficiencies. *See in re Venner*, 262 F.2d 91, 95, 120 USPQ 193, 194 (CCPA 1958). Thus, it would have been obvious to one of ordinary skill in the art at the time the invention was made to automate the manual processes of Richman and Whitacre to arrive at the claimed invention.

However, in the interest of furthering prosecution, Examiner has applied a new reference (Travis) to the claims that is more closely aligned with Applicant's claimed invention of automatically performing evaluations. The new grounds of rejection is necessitated by Applicant's amendments; thus, the finality of the Office Action is proper.

Response to Amendment

Applicant's amendments to claim 25 are sufficient to overcome the rejection under § 101 set forth in the previous Office Action. Accordingly, this rejection has been withdrawn.

Claim Rejections - 35 USC § 101

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claims 1-12 and 14-24 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.

Claims 1 and 24: Claims 1 and 24 are directed toward the statutory category of a process. In order for a claimed process to be patentable subject matter under 35 U.S.C. § 101, it must either: (1) be tied to a particular machine, or (2) transform a particular article to a different state or thing. *See in re Bilski*, 545 F.3d 943, 956 (Fed. Cir. 2008); *Diamond v. Diehr*, 450 U.S. 175, 184 (1981); *Parker v. Flook*, 437 U.S. 584, 588 n.9 (1978); *Gottschalk v. Benson*, 409 U.S. 63, 70 (1972). If neither of these requirements is met by the claim, the method/process is not patentable subject matter under § 101. Thus, to qualify as a statutory process under § 101, the claim should positively recite the machine to which it is tied (e.g. by identifying the apparatus that accomplishes the method steps), or positively recite the subject matter that is being transformed (e.g. by identifying the material that is being changed to a different state). Nominal recitations of structure in an otherwise ineligible method fail to make the method a statutory process. *See Bilski*, 545 F.3d at 957; *Benson*, 409 U.S. at 71-72. Thus, incidental physical

limitations such as insignificant extra-solution activity and field of use limitations are not sufficient to convert an otherwise ineligible process into a statutory one.

Here, the claimed process fails to meet the above requirements for patentability under § 101 because it is not tied to a particular machine and does not transform an article to a different state. The claims have been amended to recite "using a plurality of databases and a computer that includes a scorecard engine" in the preamble, as well as "automatically" performing various steps "by the scorecard engine." The amendments fail to meet the requirements of the machine-or-transformation test.

Regarding the first limitation, a preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976); *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951). Furthermore, a preamble generally is not limiting when the claim body describes a structurally complete invention such that deletion of the preamble phrase does not affect the structure or steps of the claimed invention. See MPEP 2111.02. Here, the claim body reciting the "scorecard engine" is capable of standing alone and does not require the computer recited in the preamble for completeness. Thus, the recitation of a "computer that includes a scorecard engine" in the preamble does not sufficiently tie the claim to a particular machine as required for patentability under § 101.

Regarding the second limitation, "a scorecard engine" could be software per se. Software per se is not a machine. See MPEP 2106.01 ("Both types of 'descriptive material' are

nonstatutory when claimed as descriptive material *per se*"). Thus, the recitation of "a scorecard engine" in the body of the claim does not sufficiently tie the claim to a particular machine as required for patentability under § 101.

Finally, the mere transformation of data is not sufficient to make an otherwise ineligible process claim statutory under § 101. The machine-or-transformation test requires the transformation of an "article" into a different state or thing. *In re Bilski*, 545 F.3d 943, 962 (Fed. Cir. 2008). Here, a survey subject's physical performance is not an "article" within the purview of the transformation prong of the machine-or-transformation test. Thus, the claim fails this prong of the test and is not patentable under § 101.

Claims 2-12 and 14-23: Dependent claims 2-12 and 14-23 are rejected for failing to remedy the deficiencies of the claims from which they depend.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-12, 14-23, and 25 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1: Claim 1 recites "automatically determining the coaching comment by the scorecard engine...wherein determining the coaching comment comprises selecting the coaching comment from a plurality of predefined coaching comments." From this recitation, it is unclear

whether the selection of a coaching comment is done by a human operator or automatically by the scorecard engine; the scope of the claim permits both interpretations. However, the interpretation of a human operator selecting a coaching comment is not possible because the selecting step is part of the determining step, which is automatically done by the scorecard engine. The claim should be amended to clearly recite that the selection of the coaching comment is performed automatically by the scorecard engine. An ideal recitation would positively recite the selecting step rather than the determining step: "automatically ~~determining~~ selecting the coaching comment by the scorecard engine from a plurality of predefined coaching comments...." (see e.g. claim 24). Appropriate correction is required.

Claim 25: Claim 25 is substantially similar to claim 1 and is rejected under similar rationale.

Claims 2-12 and 14-23: Dependent claims 2-12 and 14-23 are rejected for failing to remedy the deficiencies of the claims from which they depend.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-12 and 14-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Travis (US 2004/0088177) in view of Whitacre (US 2004/0138944).

Claim 1: Travis discloses an automated method for aggregating and reporting customer feedback information using a plurality of databases and a computer that includes a scorecard engine, comprising:

- conducting a survey by asking at least one survey question about at least one performance category associated with a survey subject to at least one survey participant (see figures 10-11; ¶¶ 78-87, disclosing a an employee assessment via a survey);
- collecting responses from the at least one survey participant in response to at least one survey question (see id.);
- automatically determining performance scores by the scorecard engine for the at least one performance category (see ¶ 82, disclosing calculating a score; ¶ 97);
- automatically assembling feedback analysis information by the scorecard engine, wherein the feedback analysis information comprises the performance scores and performance comments for the at least one performance category from the at least one survey participant about the performance of the survey subject (see ¶¶ 110-112, disclosing generating reports of employee performance assessments; figures 10-11 and ¶¶ 79 and 83, disclosing inputting notes);
- automatically querying a coaching comment database by the scorecard engine with the feedback analysis information associated with the survey subject and the at least one performance category for the coaching comment (see ¶¶ 99-106,

disclosing business objectives and learning objectives; ¶¶ 115-116, disclosing storing the objectives in templates; specifically ¶ 115, disclosing reusing templates for employees with similar job requirements, competencies, and skills);

- automatically determining the coaching comment by the scorecard engine for the at least one performance category based on the feedback analysis information for the at least one performance category, wherein determining the coaching comment comprises selecting the coaching comment from a plurality of predefined coaching comments (see id.);
- automatically preparing a performance survey subject scorecard by the scorecard engine containing a performance score and coaching comment for the at least one performance category (see ¶¶ 110-112, disclosing generating reports of employee performance assessments).

Travis does not explicitly disclose automatically determining a performance trend by the scorecard engine for at least one performance category based on the performance comments. However, Travis does suggest this limitation (see ¶¶ 52, 102, 126, 130, 138, and 146-147, disclosing tracking employee progress; ¶ 61, disclosing determining the current status of an employee in their tracked progress). Whitacre explicitly discloses this limitation (see figure 2: item 128, disclosing agent trending; figure 8, depicting performance over several periods; figure 13, depicting a trending report).

Furthermore, Travis does not explicitly disclose automatically determining the coaching comment based on the determined performance trend for the at least one performance category, and a comparison of the determined performance scores with performance scores for the at least

one performance category for at least one second survey subject. Whitacre discloses automatically determining a coaching comment from a plurality of predetermined coaching comments (see ¶ 49, disclosing a variety of predetermined comments) based on performance trends for the at least one performance category (see figure 2: item 128, disclosing agent trending; figure 8, depicting performance over several periods; figure 13, depicting a trending report) and a comparison of the determined performance scores with performance scores for the at least one performance category for at least one second survey subject (see ¶¶ 8, 38, and 46 for a comparison to peers).

Travis and Whitacre are both directed to employee performance management. It would have been obvious to one of ordinary skill in the art at the time the invention was made to determine performance trends as taught by Whitacre when evaluating employees using the method and system of Travis. One of ordinary skill in the art would have been motivated to do so for the benefit of efficiencies gained by detecting positive and negative trends in performance. Furthermore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to automatically determine coaching comments (as taught by both Travis and Whitacre) based on performance trends and employee comparisons (as taught by Whitacre). One of ordinary skill in the art would have been motivated to do so for the benefit of efficiencies gained by utilizing an automated recommendations database (which are known in the art).

Claim 2: Travis discloses wherein the survey subject scorecard further contains the performance comments received from the at least one survey participant for the at least one

performance category (see ¶¶ 110-112, disclosing generating reports of employee performance assessments).

Claim 3: Travis discloses prior to determining performance scores for each of the one or more performance categories, categorizing responses to each of the one or more survey questions by survey subject and by one or more performance categories associated with the survey subject (see figures 10 and 11; ¶¶ 78-87).

Claim 4: Travis discloses a method whereby determining performance scores for each of the one or more performance categories includes analyzing a set of survey responses collected from one or more survey participants responsive to questions about the performance of the survey subject (see figures 10 and 11; ¶¶ 78-87).

Claim 5: Travis does not disclose, but Whitacre teaches: comparing the performance scores for each of the one or more performance categories with performance scores for the one or more performance categories from a prior survey period (see figure 2: item 128, disclosing agent trending; figure 8, depicting performance over several periods; figure 13, depicting a trending report). Travis and Whitacre are combinable for the reasons stated in the rejection of claim 1, above.

Claim 6: Travis discloses a method further comprising comparing the performance scores for each of the one or more performance categories with performance scores for the one or

more performance categories associated with a group of survey subjects (see figures 14-15; ¶¶ 93 and 143).

Claim 7: Travis discloses a method further comprising forwarding the survey subject performance scorecard to a survey subject supervisor (see figure 25, depicting peer/team/customer surveys that are sent to a leader; ¶¶ 122-124 and 109).

Claim 8: Travis discloses a method further comprising posting the survey subject performance scorecard to an internet-based web page (see figures).

Claim 9: Travis discloses after collecting responses from each of the one or more survey participants in response to each of the one or more survey questions, storing the responses in a survey results database (see ¶¶ 4-5, 10).

Claim 10: Travis discloses a method further comprising preparing a summary report for each survey subject containing responses to each of the one or more survey questions from each of the one or more survey participants (see ¶¶ 110-112).

Claim 11: Travis discloses a method further comprising forwarding the summary report to the survey subject supervisor (see figure 25, depicting peer/team/customer surveys that are sent to a leader; ¶¶ 122-124 and 109).

Claim 12: Travis discloses a method prior to categorizing responses to each of the one or more survey questions by survey subject and by one or more performance categories associated with the survey subject, querying a survey results database for responses for each of the one or more survey participants in response to each of the one or more survey questions (see ¶¶ 93 and 143; figures 10 and 11; ¶¶ 78-87).

Claim 14: Travis discloses prior to conducting a survey by asking one or more survey questions about one or more performance categories associated with a survey subject to each of one or more survey participants, identifying one or more survey participants (see figures 10-11).

Claim 15: Travis discloses a method whereby identifying one or more survey participants includes identifying a survey sampling group based on the survey subject about which the survey is to be conducted (see ¶¶ 93 and 143).

Claim 16: Travis discloses a method further comprising obtaining contact information for each of the one or more survey participants (see figure 5).

Claim 17: Travis and Whitacre do not explicitly disclose conducting the survey by live interview with each of the one or more survey participants. Examiner takes Official Notice that it was well-known in the art at the time the invention was made to conduct interviews live and in-person. Thus, it would have been obvious to one of ordinary skill in the art at the time the invention was made to conduct live interviews and input the data into the systems taught by

Travis and Whitacre. This combination of known elements retains the functionality of the separate elements and produces a result that would be predictable to one of ordinary skill in the art.

Claim 18: Travis and Whitacre do not explicitly disclose conducting the survey by interactive voice response session with each of the on or more survey participants. Examiner takes Official Notice that it was well-known in the art at the time the invention was made to conduct interviews via interactive voice response sessions. Thus, it would have been obvious to one of ordinary skill in the art at the time the invention was made to conduct an interactive voice response interview and input the data into the systems taught by Travis and Whitacre. This combination of known elements retains the functionality of the separate elements and produces a result that would be predictable to one of ordinary skill in the art.

Claim 19: Travis discloses conducting the survey by Internet-based interview session with each of the on or more survey participants (see figures; ¶ 141).

Claim 20: Travis and Whitacre do not explicitly disclose conducting the survey via a survey kiosk with each of the on or more survey participants. Examiner takes Official Notice that it was well-known in the art at the time the invention was made to conduct interviews via survey kiosks. Thus, it would have been obvious to one of ordinary skill in the art at the time the invention was made to conduct an interview via a survey kiosk and input the data into the systems taught by Travis and Whitacre. This combination of known elements retains the

functionality of the separate elements and produces a result that would be predictable to one of ordinary skill in the art.

Claim 21: Travis discloses a method whereby the survey subject is an employee (see title).

Claims 22-23: Travis and Whitacre do not explicitly disclose wherein the survey subject is a product or service. However, Examiner notes that this limitation is an intended use of the claimed invention. The limitation is insufficient to distinguish the claimed invention over the prior art because there is no manipulative difference between the claimed invention and the prior art. In other words, Travis and Whitacre manipulate data in the same way as the claimed invention; thus, the recited method steps would be performed in the same manner regardless of whether the data is related to an employee, a product, or a service. *See* MPEP 2111.02.

Furthermore, Examiner takes Official Notice that it was well-known in the art at the time the invention was made to evaluate products and services. Thus, it would have been obvious to one of ordinary skill in the art at the time the invention was made to apply the teachings of Travis and Whitacre to products and services rather than employees. This combination of known elements retains the functionality of the separate elements and produces a result that would be predictable to one of ordinary skill in the art.

Claims 24-25: Claims 24-25 are substantially similar to claim 1 and are rejected under similar rationale. Claim 25 is directed to a system, which both Travis (see figures) and Whitacre (see figure 1) disclose.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

- Dirksen et al (US 6,853,975), directed to rating employee performance.
- Bubner (US 2004/0054567), which discloses a recommendations database.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Neil R. Kardos whose telephone number is (571) 270-3443. The examiner can normally be reached on Monday through Friday from 9 am to 5 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Beth Boswell can be reached on (571) 272-6737. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Neil R. Kardos
Examiner
Art Unit 3623

NRK
3/25/09
/Jonathan G. Sterrett/
Primary Examiner, Art Unit 3623